United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

76-7013

To be argued by
PAUL G. WHITBY

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

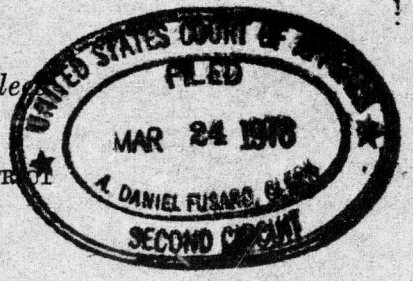
PATRICIA A. FAHEY,

Plaintiff-Appellant,

against

SHIRLEY E. FAHEY and NORMAN CODO,

Defendants-Appellees.



ON APPEAL FROM THE JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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The sole issue to be determined on this appeal is whether the District Court committed error in dismissing plaintiff's Complaint for lack of personal jurisdiction over the defendants.

STATEMENT OF THE CASE

By this action plaintiff Patricia A. Fahey seeks to recover compensatory damages from the defendants who it is alleged have violated plaintiff's right to receive income under the Last Will and Testament of her father Patrick D. Fahey of which the defendants are executors. The defendant Shirley E. Fahey is the mother of Patricia A. Fahey.

The defendants did not answer plaintiff's Complaint but rather moved before the District Court for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure dismissing the Complaint on the ground that the District Court lacks jurisdiction over their persons. By Memorandum and Order dated December 11, 1975, the Honorable Richard Owen, Judge of the United States District Court for the Southern District of New York, dismissed plaintiff's Complaint for the reason that the District Court lacks

personal jurisdiction over the defendants. Judgment was entered accordingly. The plaintiff appeals from that determination.

The plaintiff is a resident of the State of New York (Brief p.2).* During her mother's lifetime the plaintiff is a potential beneficiary of income and principal under the residuary trust to be established under the Last Will and Testament of Patrick D. Fahey (a complete copy of the Will is contained in Appellant's Appendix and labeled Exhibit 1). The defendants, co-executors of the Will of plaintiff's father, are each residents of the State of Illinois (App. p.7). The Will was probated in the State of Illinois (Brief p.2). The Estate of Patrick D. Fahey has no assets in the State of New York (App. p.7). None of the actions or omissions plaintiff claims the executors of her father's Will have committed or omitted took place within the State of New York. Plaintiff claims that all such actions or omissions took place within the State of Illinois (Brief p.3).

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* The references hereinafter used are to Appellant's Appendix or to her Brief. The document designated Appendix B commencing on page 7 of Appellant's Appendix is a transcription of the affidavit of Norman Codo submitted in support of defendants' motion to dismiss. Those items contained in Appellant's Appendix listed as Appendix D commencing on page 14, Appendix E commencing on page 24, Appendix F commencing on page 28 and Appendix H commencing on page 37 were submitted to the District Court and signed by the plaintiff although such items were not submitted in affidavit form.

PRELIMINARY STATEMENT

There is no allegation in the Complaint of plaintiff or in her affidavits submitted in the District Court in opposition to the defendants' motion to dismiss her Complaint upon which jurisdiction over the defendants may be asserted. There is no allegation respecting any transaction or event in which the defendants were a party which occurred in the State of New York or in the Southern District of New York.

The plaintiff has not cited nor is there a New York State or federal statute upon which jurisdiction over the persons of the defendants may be asserted. The District Court's determination that the Complaint of plaintiff should be dismissed for lack of personal jurisdiction over the persons of the defendants should be affirmed.

ARGUMENT

POINT I: THE NEW YORK LONG ARM STATUTE DOES NOT CONFER JURISDICTION OVER THESE DEFENDANTS.

Plaintiff concedes that each of the defendants is a resident of the State of Illinois and that the Estate of Patrick D. Fahey in which she claims an interest has no assets in the State of New York.

Paragraph THIRD (a) of the Last Will and Testament of Patrick D. Fahey, which establishes the residuary trust in which plaintiff claims an interest, provides in part "that Patricia A. Fahey shall receive no less than $2,000 per month from this trust and from other sources." One of plaintiff's asserted grounds for jurisdiction is that although the Estate may not have assets in the State of New York, defendants have not disclosed the "other sources" (Brief p.4). This is not a jurisdictional issue but rather a will construction problem which cannot be raised in this forum but only in the Illinois forum where the Will was probated.* It appears from reading the quoted language of the Will the decedent's intent was to provide that Patricia A. Fahey would have aggregate monthly income of at least $2,000. The "other sources" referred to in the Will appear to be plaintiff's other sources of personal income. If, therefore, Patricia A. Fahey received gross income from her personal earnings of $2,000 a month, the trustees would not be required to make any payments to her. Upon oral argument of defendants' motion before the District Court

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* Plaintiff's presentation in her Brief at pages 14-16 concerning the definition of power of appointment and certain requirements as to estate tax filings appears to be founded on the same or a similar foundation. Since none of these arguments are jurisdictional in nature, they will not be addressed further in this brief.

and at the request of Judge Richard Owen, the District Court was advised that the reason no distributions have been made to the plaintiff is that the residuary trust, like the marital trust, has not yet been funded. The claims asserted against the Estate of the decedent, most of which involve protracted legal proceedings, presently exceed the value of the Estate.

By use of the following boot strap argument (Brief p.6) plaintiff attempts to create New York long arm jurisdiction where none exists. She contends that (1) under the terms of the Will of her father the executors were to have made certain monthly distributions to her (App. Exhibit 1 ¶ THIRD); (2) if the defendant co-executors had made the designated monthly payments they would have had "minimal contacts" with the State of New York; (3) having failed to comply with the provisions of the Will they have ensured that there would be no minimal contact with the State of New York and as such, have committed a persistent course of conduct without the State of New York creating a tortious injury to plaintiff and her property within the State of New York. From such a theory plaintiff argues the defendants are subject to in personam jurisdiction in the State of New York.

Such circumlocutory reasoning will not create jurisdiction where none lies. Plaintiff's argument holds

no more substance than if she had claimed the defendants were under an obligation to enter the territorial limits of the State of New York for the purpose of accepting personal service of a summons and complaint. Subject to due process requirements, jurisdiction must be founded on a statutorily designed predicate.

Section 302 of the New York Civil Practice Laws and Rules sets forth the statutory basis by which personal jurisdiction may be asserted over the persons of nonresidents. The full text of Paragraph (a) of that provision is set forth in the Addendum to this brief at page 15. Plaintiff appears to rely only on subparagraph (2) and (3)(i) thereof (Brief p.7), neither of which confer jurisdiction over these defendants.

Even assuming that the acts alleged in the Complaint were found to be torts committed by the defendants outside the state, none of the allegations contained in the Complaint or facts before this Court suggest that there are any minimal contacts between the defendants and the State of New York as to confer jurisdiction.

With respect to her claim that subparagraph (2) of §302(a) confers jurisdiction plaintiff relies upon Singer v. Walker, 15 N.Y.2d 443, 261 N.Y.S.2d 8 (1965). The plaintiff failed to advise this Court that the decision she relied

upon of the Supreme Court, Appellate Division, First Department of the State of New York was set aside by the Court of Appeals of the State of New York. The plaintiff in that action, a resident of the State of New York, was injured when a geologist's hammer, which he was using in Connecticut, broke and a chip penetrated his right eye. The hammer had been purchased in New York by the mother of the plaintiff. Additionally, the defendant conducted regular business within the State of New York. The Court of Appeals set aside the decision of the Supreme Court of the Appellate Division holding that it was in error in finding the defendant subject to jurisdiction under subparagraph (2) of §302(a) in that it had not committed a tort within the State of New York. Nevertheless, on the strength of subparagraph (1) which authorizes jurisdiction over nonresidents who transact business within the State, the New York Court of Appeals affirmed the order sustaining jurisdiction.

Plaintiff's contention that omissions of the defendant co-executors outside the State of New York constituted a tort within the State of New York, in light of the Court of Appeals decision in Singer v. Walker, is erroneously founded.

In a same time as it decided Singer v. Walker, the New York Court of Appeals decided the matter of

Feathers v. McLucas, 15 N.Y.2d 443, 261 N.Y.S.2d 8 (1965). In Feathers v. McLucas the plaintiff brought suit to recover for injuries and property damage sustained as a result of an explosion on a business highway near her home in Berlin, New York of a tractor drawn steel tank en route from Pennsylvania to Vermont. The tank containing highly flamable liquified propane gas had been manufactured by the defendant in Kansas. The Court of Appeals concluded that defendant had not committed a tortious act within the state within the meaning of subparagraph (2) of §302(a) of the CPLR.

Following and in response to the decision by the Court of Appeals in Feathers v. McLucas, the New York State Legislature adopted subparagraph (3) of §302(a) of the CPLR, the other provision relied upon by the plaintiff. It was the expressed intention of the Judicial Conference as reflected in the Memorandum of the Judicial Conference submitted to the Legislature recommending adoption of subparagraph (3) that jurisdiction over nonresident defendants would not lie unless the "persistent course of conduct" occurred in the State of New York. (Plaintiff in her Brief p.3 asserts that the defendants "have committed a persistent act in the State of Illinois"). The Judicial Conference in expressing its intention on the constitutionality of the proposed amendment to expand long arm jurisdiction

stated as follows:

> "This proposed amendment is broad enough to protect New York residents yet not so broad, even though constitutionally feasible, as to burden unfairly nonresidents whose connection with the state is remote and who could not reasonably be expected to foresee that their acts outside of New York could have harmful consequences in New York. The Judicial Conference considers that this is the most equitable policy."

The full text of the Memorandum of the Judicial Conference is contained in McKinney's Session Laws of New York 1966 at page 2911.

The language of the statute as adopted reflects that intention; it reads in part at subparagraph (3)(i), "... engages in any other persistent course of conduct ... in the state ...". The Judicial Conference and the Legislature have firmly established that jurisdiction under CPLR §302(a)(3)(i) exists only if (i) there is a nexuses between the tort committed outside the state and the harmful effect within the state and (ii) there is an independent connection between the tortfeasor and the State of New York. This is the view expressed by Professor Joseph McLaughlin in his Practice Commentary contained in McKinney's Consolidated Laws of New York at C302:22. In accord: Chunky Corp. v. Blumenthal Bros. Chocolate Co., 299 F. Supp. 110 (S.D.N.Y. 1969) where a nonresident tortfeasor corporation which

derived 4% of its revenue from New York sources did not meet the standards in absence of showing a continuous and persistent course of conduct in the State of New York.

Plaintiff has demonstrated no statutorily required independent connection between the defendants and the State of New York and accordingly, no jurisdiction may be asserted over the defendants pursuant to the New York long arm statute CPLR §302.

POINT II: THERE ARE NO FEDERAL STATUTES WHICH CONFER JURISDICTION OVER THESE DEFENDANTS

The plaintiff in her brief contends that she can assert in personam jurisdiction over the defendants under the Civil Rights Act, 42 U.S.C. §1985 et seq. The text of §1988 of Title 42 of the U.S.C., the jurisdictional provision upon which plaintiff relies, is set forth in the Addendum to this brief at page 16. A cursory review of that provision will indicate to this Court that the provision only authorizes the plaintiff, assuming that she has a valid cause of action under the Civil Rights Act, to proceed to redress her wrongs in a federal district court. Neither that provision nor any other provision in the Civil Rights Act authorizes nationwide service of process or

authorizes an expansion of in personam jurisdiction greater than that provided in Rule 4(f) of the Federal Rules of Civil Procedure. Rule 4(f) provides in relevant part as follows:

> "(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state."

In the two cases where the federal courts have been called upon to determine whether the Civil Rights Act authorized nationwide jurisdiction and service of process both courts concluded that service of process is limited by the general limitation of service as authorized by Rule 4(f). See Safeguard Mutual Insurance Company v. Maxwell, 53 F.R.D. 116 (E.D. Penn. 1971) and Smith v. Ellington, 348 F.2d 1021 (6th Cir. 1965).

Plaintiff attempts to distinguish each of Safeguard Mutual Insurance Company v. Maxwell and Smith v. Ellington, however, her distinctions are unrelated to the underlying jurisdictional issue. It should be noted that the Court of Appeals for the Sixth Circuit in deciding Smith v. Ellington found that (i) the plaintiff had improperly sought to obtain jurisdiction over nonresidents by the service of a summons and complaint upon the Secretary of State of the State of

Tennessee, and (ii) the Civil Rights Act did not authorize the nationwide service of process beyond the general limitations of Rule 4(f). That Court noted that

> "Section 1343, Title 28, United States Code, which confers original jurisdiction upon the District Courts in certain civil rights actions, deals with jurisdiction of the subject matter of the litigation, not with personal jurisdiction over the defendants."

The Civil Rights Act and Section 1988 thereof is not, as plaintiff contends in her Brief p.10 "the means to provide for the means to execute."

Whenever the Congress has sought to provide for nationwide service of process it has explicitly so provided. See for instance Section 22 of the Securities Act of 1933, 15 U.S.C. §77v; Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa and Section 12 of the Clayton Act, 15 U.S.C. §22. No such express provision for nationwide service of process is contained in the Civil Rights Act.

Jurisdiction may not be asserted over these defendants under the Civil Rights Act and the District Court was correct in so finding.

POINT III: ASSERTION OF JURISDICTION OVER THESE DEFENDANTS WOULD VIOLATE DUE PROCESS

Assertion of in personam jurisdiction over these defendants would violate due process. The Federal constitu-

tional requirements of due process are only satisfied where the contacts of the nonresident defendants with the forum state are such that the maintenance of a suit against them will not offend traditional notions of fair play and substantial justice. International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed 95 (1943) and McGee v. International Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957).

See also, Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), where extraterritorial jurisdiction over a nonresident trustee in a will contest involving trust assets not located in the forum state was denied because the defendant trustee did not have "minimal contacts" with Florida, the forum state. The Supreme Court explained the "minimal contacts" rule promulgated in International Shoe Co. v. State of Washington, supra, by stating:

> "The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." 357 U.S. at 253, 78 S.Ct. at 1240, 2 L.Ed.2d at 1298.

In the case sub judice there have been no acts committed by the defendants within the forum state nor have the defendants sought the benefits or the protections of

the law of the forum state. The only connection between the defendants and the State of New York is that plaintiff saw fit to institute suit against them in the State of New York.

Assertion of jurisdiction over these defendants in the State of New York would violate due process.

CONCLUSION

The Memorandum and Order dated December 11, 1975 of the Honorable Judge Richard Owen and the Judgment entered thereon dismissing the Complaint of the plaintiff on the ground that the District Court lacks personal jurisdiction over the defendants should be affirmed in all respects.

Respectfully submitted,

HALL, DICKLER, LAWLER, KENT
& HOWLEY
Attorneys for Defendants-Appellees

Paul G. Whitby,
Of Counsel

§ 302. Personal jurisdiction by acts of non-domiciliaries.

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state.

* * *

CIVIL RIGHTS ACT, 42 U.S.C. §1988

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PATRICIA A. FAHEY,

Plaintiff-Appellant,

against

SHIRLEY E. FAHEY and NORMAN CODO,

Defendants-Appellees.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN being duly sworn, deposes and says that he is over the age of 18 years. That on the 24th day of March, 1976, he served two copies of the Brief for Defendants-Appellees on Patricia A. Fahey, pro se

~~the attorney~~ for the Appellant by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said ~~xxxxxxx~~ Patricia A. Fahey at No. 750 Park Avenue, New York ( ) N. Y., that being the address designated by ~~hexx~~ her for that purpose upon the preceding papers in this action.

Irving Lightman

Sworn to before me this
24th day of March, 1976.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976